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No. 88-1600

In The

Supreme Court of the United States

October Term, 1988

HOLY SPIRIT ASSOCIATION FOR THE UNIFICATION OF WORLD CHRISTIANITY and NEW EDUCATION DEVELOPMENT SYSTEMS, INC.,

Petitioners,

v.

DAVID MOLKO and TRACY LEAL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the Free Exercise Clause of the First Amendment necessarily confers an absolute immunity upon petitioners absolving them of any legal accountability for the consequences of engaging in a course of fraudulent and coercive conduct whereby petitioners deceived respondent into submitting himself, without his knowledge or consent, to petitioners' implementation of a strategy of coercion and subjugation accomplished by an intense program of brainwashing which caused respondent to lose his ability to make independent decisions by undermining his ability to reason and impairing his capacity to intelligently exercise an informed consent or whether the California Supreme Court fully considered and correctly decided the issues below.

2. Whether the creation of an absolute immunity based upon the Free Exercise Clause of the First Amendment which would protect petitioners from being held legally accountable for the consequences of employing deception and brainwashing as a practice of obtaining and maintaining its membership would violate the Establishment Clause of the First Amendment as an impermissible fostering and promotion of religion.

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Respondent, David Molko, hereby presents his opposition to petitioners writ of certiorari to review the judgment of the Supreme Court of the State of California.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported at 46 Cal.3d 1092, 762 P.2d 46, 252 Cal.Rptr. 122 (1988). Respondent adopts the remainder of petitioners' text setting forth the opinions below.

JURISDICTION

Respondent adopts petitioners' jurisdictional statement.

RESPONDENT'S STATEMENT OF THE CASE

The California Supreme Court found that for the purposes of a motion for summary judgment petitioners'[1] "religious organization can be held liable on a traditional cause of action for fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion." App. 24a.[2] Similarly, the court held that the Unification Church could be held liable for the intentional infliction of emotional distress and provide restitution for money obtained through its scheme of control perpetrated by lying and through coercion. App. 29a-33a, 34a-36a.

What is at issue is simple. Can a religion or an organization operating under the legally described structure of a religion be permitted to perpetrate "fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion"? Ap. 24a. Any reasonable or fair person would be inclined

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[1] As to the petitioners herein, Molko uses the "names 'Unification Church' and 'the Church' to refer collectively to the Holy Spirit Association for the Unification of World Christianity and New Development Systems, Inc." App. 2a.

[2] So as not to unnecessarily burden this Court with paper, respondent has chosen not to file an appendix with this brief in opposition. Thus, any reference herein to an appendix is made to the appendix filed by petitioners.

to answer, No. Furthermore, if such an organization is found to be responsible for such a violation of a person's inalienable rights, then should they not be expected to answer in damages and make restitution to that person whose rights had been violated? A reasonable and fair person would be inclined to answer, Yes.

This is precisely what the California Supreme Court has concluded and petitioners seek overturned.

It is not the desire of respondent to infringe upon or destroy the rights of religions within this nation. The decision of the California Supreme Court does not do so. Upholding the California Supreme Court's decision will not do so.

The basic beliefs and tenets of any religion, regardless of the perceived morality of such beliefs, are by law sacrosanct. However, when the practices of such organizations violate the law, then they are punishable under the law. It is simple, just and necessary.

The petitioners have, by their own admission, engaged in deceptive recruiting practices to bring nonmembers into their organization. Such practices are blatantly fraudulent. Fraud is illegal and in itself subjects petitioners to civil accountability for these practices. These fraudulent practices then lead these victims to be unwitting participants in what the California Supreme Court has called "coercive persuasion." This "coercive persuasion" can most clearly be recognized when labeled with its more common term, "brainwashing." Such coercive practices, or brainwashing are illegal and should subject petitioners to civil liability for employing them.

This is precisely what happened to respondent, David Molko.[3] His association was obtained by deceptive recruiting practices which purposefully, specifically, and premeditatedly misrepresented that the recruiting agents had no religious affiliation, which they did, and that their goal, (which is indisputable), was to make David Molko a member of Sun Myung Moon's Unification Church, which it clearly was.

Petitioners deceived, coerced, dominated and exploited David Molko and now, these same petitioners seek to crawl beneath the mantle of religious liberty, to pull the First Amendment over them like a rock for protection. Once again, a religion's beliefs, no matter how heinous or immoral they may seem to a just and moral person, are sacrosanct. When their actions violate the law, then the First Amendment freedom of religious expression is not an absolute shield, nor should it be.

How does the Unification Church seek to avail itself of freedom of religion in an attempt to legitimize its actions of deception and coercion, of fraud and brainwashing? The Church would have this Court apply the term "proselytizing" to describe the process "of activities leading to religious conversion." (Petition, 2.) Thus, if the Church employed deception and lies ("proselytizing") to isolate Mr. Molko so that he could then be the unwitting subject of Chinese Communist brainwashing procedures ("conversion") commonly employed by the Unification

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[3] For the purposes of the herein opposition to the petition for certiorari, the arguments are submitted on behalf of David Molko. Thus, he will be referred to either as "Molko" or "respondent."

Church, then that is simply, in their eyes, to be seen as an acceptable religious practice.[4] This brainwashing, or as the Church would have it, "conversion," to secure allegiance to Korean national Sun Myung Moon, along with the deceptive "proselytizing," according to the Church, should automatically and unquestioningly be protected as a "core religious function." Petition 2.

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[4] That fraud is illegal is indisputable. The Unification Church admits that it fraudulently denied its religious nature and specifically misrepresented its identity to persuade Molko to associate with it. Pet., 5. The purpose of such fraud was to deceive Molko into a setting where he could be "brainwashed." Complaint ¶¶ 41-45. App. 13a.

"Brainwashing is 'fostered through the creation of a controlled environment that heightens the susceptibility of a subject to suggestion and manipulation through sensory deprivation, physiological depletion, cognitive dissonance, peer pressure, and a clear assertion of authority and dominion. The aftermath of indoctrination is a severe impairment of autonomy and [of] the ability to think independently, which induces a subject's unyielding compliance and the rupture of past connections, affiliations, and associations." App. 14a quoting *Peterson v. Sorlein* (Minn. 1980) 299 N.W.2d 123, 126, *cert. denied* (1981) 450 U.S. 1031. Such procedures were first employed by the Communist Chinese in the 1950s for political indoctrination. T.E. Chen, *Thought Reform of the Chinese Intellectuals* (1960) Hong Kong University Press [hereinafter "Chen"]; R.J. Lifton, *Thought Reform and the Psychology of Totalism* (1961) W.W. Norton & Co.; E. Schein, *Coercive Persuasion* (1971) W.W. Norton & Co.

In conjunction with the use of the terms "thought reform" and "coercion," Molko adopts "the terms 'coercive persuasion,' 'mind control,' and 'brainwashing' [which will be used] interchangeably to refer to the intense indoctrination procedures discussed herein." App. 13a.

Were such an interpretation to result in the establishment of an immunity sought by the Church, it would constitute an unprecedented and intolerable abuse of religious liberty. Then, the free exercise of religion not only would encompass deception, but also would encompass the procedures formerly used by the Communist Chinese to secure a compliant citizenry. Had Molko known of the Church's true identity at the outset of its solicitation of him, he would have rejected its overtures. This type of coercive persuasion does not include the use of force. It does not include the threat of force.

In fact, "No physical torture was ever used in the thought reform of the intellectuals." *Chen*, 71. See also J.D. Frank, *Persuasion and Healing* (1974) Schoken Books, 90 (hereinafter *Frank*) [The Chinese intellectuals placed at a "revoluntary college" were "not subjected to the physical hardships that tend to obscure the psychological features of the process." The Chinese Communist form of brainwashing "relies less on physical torture than on psychological pressures, especially the manipulation of group forces."] And see Biderman, *Communist Attempts To Elicit False Confessions From Air Force Prisoners Of War* (1957) 33 New York Academy of Science 616, 618 ["[I]nflicting pain is not a necessary or particularly effective method of inducing compliance."]

In the setting surrounding the Chinese intellectuals, there was a complete lack of privacy, an unremitting routine of self-criticism, group discussion, rote learning, constant repetition of Communist viewpoints and the repeated rewriting and rejection of autobiographical essays. The group exploited the feeling of emotional

nakedness and unworthiness that is the result of relentless self-criticism. The group focused upon items obtained from the individual's life history which caused feelings of guilt, conflict and anxiety to arise within him. These feelings were magnified when the group rejected, isolated and reviled him because of his "improper" attitudes and past behavior. He was placed in a situation in which he could not avoid having his past life reviewed and questioned and could not avoid hearing an exposition on the Communist position. The group rewarded and approved the individual when he behaved in accordance with their aims, and in that way indicated to him that the only possible solution to an intolerable situation was to accept the "proper" point of view. Hinkle and Wolfe, *Communist Interrogation and Indoctrination of "Enemies of the State"* (1956) 76 A.M.A. Archives of Neurology and Psychiatry 115, 173-174.

The processes involved can be grouped according to three interrelated aspects – extreme emotional arousal, total milieu control, and the interrogation. The methods, "attempted to produce an intense, disorganizing emotional state in their subjects, to cut them off as completely as possible from all social supports of their previous world view, and to immerse them in a social milieu that consistently and uniformly represented the Communist one." *Frank*, 91.

These are, in fact, the nefarious techniques which the Unification Church used to render Mr. Molko incapable of making a decision of his own free will regarding his affiliation and association with the Church. This is the very essence of the entire case: once again, beginning with deception (fraud or "proselytizing"), leading to

coercive persuasion (brainwashing or "conversion"), the Church deprived Mr. Molko of his constitutional rights of free will, deprived him of his ability to act freely and make decisions that could be considered by any reasonable and fair person to be decisions that were his own. It was in this association and in this state of mind that Mr. Molko was importuned to and did give to the Unification Church money, labor, devotion and obedience. As a result of this scheme of fraud and coercion, the Unification Church was unjustly enriched.

Under this limited set of circumstances, it was the Church, not Molko, which made the decision that he would enter into a religious affiliation from which he could not escape. If an immunity were conferred upon the Church which was to protect it from civil liability for engaging in such conduct, the result would constitute an impermissible fostering of religion. Were the State to protect the Church from having to legally answer for the consequences of lying to citizens, including Molko, the Church could employ brainwashing procedures with impunity. Such would constitute an unconstitutional establishment of religion because the decision whether or not to religiously affiliate would effectively be removed from the sphere of Molko's control. By default, in the matter of the religious affiliations of its citizens, the State would defer to the Church and thus establish the Church's power as superior to its own.

To confer an immunity upon the Unification Church protecting it from being held legally accountable for the consequences of deceptive and coercive conduct would in effect sanction the use of brainwashing procedures on

American citizens without either their knowledge or consent. Even when cloaked in the sacred terminology of the free exercise of religion, our Democracy cannot tolerate such as that urged by the Church.

1. With certain additions to the record here, Molko adopts by reference the statement of facts set forth in the opinion of the Supreme Court of the State of California as though they were fully set forth herein. App. 4a-8a.

During the first 12 days that Molko spent in the indoctrination camps, the regimentation of the program caused him to feel inner conflict. Molko Dep. 127. In the camps' environment there was no information available that was critical of or which even made reference to the Unification Church. There was a conspicuous absence of radio, television or printed material such as newspapers. Molko Dep. II 10, 117. The same two people were constantly with him wherever he went in order to keep him apart from and prevent communication with others who also were new to the group situation. Molko Dep. 130, Molko Dep. II. 17, 61-62, 68. Not only did the same two individuals constantly monitor Molko, they also guided him into participation in small group discussions, which were always led by the same person within the same group after each of the indoctrination lectures. Molko Dep. 130-142. During the course of the small-group meetings Church members urged Molko to "open up." In response, he revealed his hopes of becoming a better person, his doubts of himself and of his career, problems he experienced in his family and in law school, and problems and difficulties he experienced when trying to relate to other people. Molko Dep. 148-153. During the lectures, points were repeatedly made in an emotional

manner about the destruction of the nuclear family, the breakdown in communication among people and chaos in the order among the nations of the world. Molko Dep. 179. Molko was instructed that there were things in the world that were wrong and that the solution was to become a better person, which could be accomplished by working with others in the group. Molko Dep. 204-205. He was "perplexed," not bored, even though within two days the lectures started to repeat. Molko Dep. 157, 179. Molko found that he was always "very tired" and ready to go to sleep. Molko Dep. 142-143.

At one of the indoctrination camps, after almost everyone else had gone to sleep, Molko was in the bathroom talking with another recruit about leaving the camp. A Church member forcibly disrupted their conversation by violently grabbing the other person and rushing him out of the bathroom so that he and Molko no longer could freely converse between themselves. Molko Dep. 189-194.

2. For the purposes of this brief's discussion in opposition, Molko sued the Unification Church for fraud, intentional infliction of emotional distress and restitution. Molko's fraud claim has two general parts. First, he contends that "specified members of the Unification Church knowingly misrepresented the Church's identity with the intent to induce [him] to associate with and ultimately join the Church." App. 12a. Second, Molko contends "that by the time the Church disclosed its true identity [to him], the Church's agents had rendered [him] incapable of deciding not to join the Church, by subjecting [him], without [his] knowledge or consent, to an intense program of coercive persuasion or mind control. [Footnote

omitted.] [He contends], in other words, that the Church deceived [him] into a setting in which [he] could be 'brainwashed,' and that the Church could not then 'cure' the [initial] deception by telling [him] the truth after [his] involuntary indoctrination had been accomplished." App. 13a.

Molko's cause of action for intentional infliction of emotional distress was based upon the same general course of conduct of the Unification Church as was his fraud claim. That is, that the "misrepresentation and concealment of the Church's identity for the purpose of inducing [him] to submit unknowingly to coercive persuasion" was extreme and outrageous. App. 29a, 32a-33a. Moreover, because "the Church's continued deceptions might well be seen as conduct breaching [his] trust in the integrity of those who were promising to make [his] life more meaningful . . . [this] might well constitute an abuse of 'a relation or position which gives [the Church] power to damage [Molko's] interest.' [Citation.]" App. 33a.

Molko's cause of action for restitution "arises directly out of his fraud theory: he asserts that the Church deceived him into unknowingly submitting to coercive persuasion, thereby obtaining undue influence over him which it later used to extract the gift" of $6,000. App. 34a. Since undue influence is " 'that kind of influence or supremacy of one mind over another by which that other is prevented from acting according to his own wish or judgment [Citation],' it occurs when 'one party uses [its] dominant psychological position in an unfair manner to induce the subservient party to consent to an agreement to which he otherwise would not have consented. [Citation.]' " App. 35a.

REASONS THE WRIT SHOULD BE DENIED

The Supreme Court of California has scrutinized this issue in a manner which is consistent with the prior decisions of this Court and those of many lower federal and state courts. It is limited to its facts, that is, the use of deceit to cause one to unknowingly submit to coercive persuasion and is not conduct which the First Amendment was designed to protect. Since no other religious organizations employ deception as a means of recruiting new members, App. 8a, religious organizations, in general, have nothing to fear with respect to engaging in open and candid proselytizing activities. Thus, the California Supreme Court's decision is easily limited to the facts to which it applies.

As deceit is a facet of fraud, coercive persuasion is a facet of undue influence. Courts have long recognized that the claimed practice of religion constitutes no privilege either to practice deceit or to unduly influence those who have placed their trust in the integrity of their freely chosen religion. *A fortiori*, when a religion is not chosen freely and voluntarily, the First Amendment should not shield the Church from responsibility for its excesses.

1. There is nothing new either about fraud or about undue influence. There is nothing new about the joint operation of both upon an unsuspecting victim. There is even nothing new about the perpetration of both fraud and undue influence within a context claimed to be religious. What *is* new about the facts in this case is the psychological technology developed in the 1950s by the Communist Chinese, and used by the Church, known as coercive persuasion. It is unusual to use deceit to cause

an individual to unknowingly place himself in an isolated and controlled setting. It is unusual to, in the absence of his knowledge or consent, to then expose that individual to such coercive persuasion. Coercive persuasion is much more than emotionally compelling speech. It involves the implementation of specific and identifiable techniques.

Since Molko was deceived into subjecting himself, without his knowledge or consent, to coercive persuasion, and where the result of such circumstance was the Church's *exploitation of him for labor and money*, a traditional cause of action for fraud has been alleged. Common law fraud "includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or *by which an undue and unconscientious advantage is taken of another.* [Emphasis added.]" *SEC v. Capital Gains Research Bureau* 375 U.S. 180, 194 (1963). Over the centuries, human deviousness has continually illustrated its facility for taking undue and unconscientious advantage over others. Such facility has not been limited to damages which are merely out-of-pocket.

The fact that the initial fraud was developed further by the imposition of undue influence makes it more, not less, fraudulent. Undue influence describes persuasion that is in nature so coercive that "it overcomes the will without convincing the judgment. [Citation.] The hallmark of such persuasion is high pressure which works upon the mental, moral or emotional weakness to such an extent . . . that a person's will may be overborne without misrepresentation." (*Odorizzi v. Bloomfield School District* 246 Cal.App.2d 123, 130, 54 Cal.Rptr. 533, 539 (1966).)

There is no constitutional "immunity" from common law causes of action alleging tortious activity. *Van Schaick v. Church of Scientology of California* 535 F.Supp. 1125, 1134-1135 (1982); *In Re The Bible Speaks* 73 B.R. 848 (Bkrtcy.D.Mass. 1987); *Nelson v. Dodge* 68 A.2d 251 (1949).

Since the aftermath of coercive persuasion not only includes the loss of labor and money, but also can include the development of "serious and sometimes irreversible physical and psychiatric disorders, up to and including schizophrenia, self-mutilation and suicide," App. 26a, fraudulent conduct which leads to such consequences traditionally is actionable.

2. The decision below is consistent with the decisions of this Court and lower courts in applying both the Free Exercise Clause and Establishment Clause. To decide in any other way would allow religion to trample upon the rights of citizens to Freedom of Thought and Freedom of Choice when it comes to matters which purport to be religious. Were the California Supreme Court to have ruled otherwise, it would have denied Molko's rights to the Free Exercise of Religion, Freedom of Association, Freedom of Speech, Privacy as well as his right not to be the subject of an Establishment of Religion.

In *United States v. Ballard* 322 U.S. 78, 86 (1944) this Court recognized that " . . . Freedom of thought, which includes freedom of religious belief, is basic in a society of free men." See also *Palko v. State of Connecticut* 302 U.S. 319, 326-327 (1937) [" . . . freedom of thought and freedom of speech. Of that freedom one may say that it is the matrix, the indispensible condition, of nearly every other form of freedom."] Since coercive persuasion causes "a severe impairment of autonomy and [of] the ability to

think independently," App. 14a, it eviscerates freedom of thought. When sectarian involvement is caused by deception and coercion, it cannot, by definition, constitute the *free* exercise of religion because "[f]undamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of *voluntary choice* by individuals and their associations . . . [Emphasis added.]" *McDaniel v. Paty* 435 U.S. 618, 640 (1978) (plurality opinion). Since very few religions employ ordinary deceit to lead to brainwashing techniques in order to ensnare "converts," very little, if any, threat is posed toward honest and truthful methods which seek "to proselytize and convert others to the beliefs and practices of a religion." Pet. 16.

The Unification Church failed to advise Molko of the truth of its treatment of him because of a belief in "Heavenly Deception." According to Molko, that "doctrine holds, in essence, that it is acceptable to lie to someone in order to give him an opportunity to hear Reverend Moon's teachings. [Footnote omitted]." App. 21a.

Although the right to hold such a belief is absolutely protected, the right to act upon it is not. *Cantwell v. Connecticut* 310 U.S. 296, 303 (1940). Thus, a fraud action may be maintained where fraud implicates conduct, even if it is religiously motivated. *Sherbert v. Verner* 374 U.S. 398, 402-403 (1963).

The conduct at issue here is the use of fraud to cause an unknowing submission to brainwashing. Both fraud and brainwashing are specific conduct. To determine whether or not the Church lied to and brainwashed Molko would require as much a determination of the

truth or validity of the tenets of the Church as a determination would have been required on the truth or validity of communism in order to determine that a Chinese intellectual had been brainwashed. Thus, there is no improper or unconstitutional implication of the beliefs of the Unification Church.

Nonetheless, the imposition of liability does burden the free exercise of the Unification Church's religion. "While such liability does not impair the Church's right to believe in recruiting through deception, its very purpose is to discourage the Church from putting such belief into practice by subjecting the Church to possible monetary loss for doing so. Further, liability presumably impairs the Church's ability to convert nonbelievers, because some potential members who would have been recruited by deception will choose not to associate with the Church when they are told its true identity." App. 25a.

Although the burdens are real, they are not substantial. "Being subject to liability for fraud does not in any way or degree prevent or inhibit Church members from operating their religious communities, worshipping as they see fit, freely associating with one another, selling or distributing literature, proselytizing on the street, soliciting funds, or generally spreading Reverend Moon's message among the population. . . . At most, it potentially closes one questionable avenue for bringing new members into the Church." App. 25a.

Next, the State must identify the interests which justify such a marginal imposition on the Unification Church. "Not all burdens on religion are unconstitutional. [Citation.] The state may justify a limitation on

religious liberty by showing that it is essential to accomplish an overriding governmental interest." *United States v. Lee* 455 U.S. 252, 257-258 (1982). The California Supreme Court found that the Unification Church's alleged conduct constituted a "substantial threat to public safety, peace [and] order" because "when a person is subjected to coercive persuasion without his knowledge or consent . . . [he may] develop serious and sometimes irreversible physical and psychiatric disorders, up to and including schizophrenia, self-mutilation, and suicide." See Committee on Foreign Affairs, U.S. House of Representatives Staff Report, *The Assassination of Representative Leo J. Ryan and the Jonestown, Guyana Tragedy* (1979).[5] Additionally, the court found a compelling interest "in protecting the family institution [Citations] [s]ince the family almost invariably suffers great stress and sometimes significant financial loss when one of its members is unknowingly subjected to coercive persuasion." App. 25a-26a.

Moreover, while not expressly reached by the court, the State has an interest in the freedoms of thought, choice and speech of its citizens which is recognized in its statutes and case law and which is basic to our democratic institutions. As has been long recognized by this Court,

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[5] This Court has held that the State "has a significant interest in protecting its citizens from abusive practices in the [Unification Church's] solicitation of funds for charity." *Larson v. Valente* 456 U.S. 228, 245 (1982). *A fortiori*, the State has an interest in protecting citizens from abusive and "deceptive recruitment practices." App. 26a.

> "Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed the *freedom to think as you will and to speak as you think* are means indispensible to the discovery and spread of . . . truth. . . .[Emphasis added.]"

Whitney v. California 274 U.S. 357, 375 (1927). One commentator put the point this way:

> "But it is not just the search for political truth for which freedom of speech is a necessary condition. The search for all forms of 'truth,' which is to say the search for all aspects of knowledge and the formulation of enlightened opinion on all subjects is dependent upon *open channels of communication*. Unless one is exposed to all the data on a given subject it is not possible to make an informed judgment as to which 'facts' and which views deserve to be accepted. When any governmental body, be it a legislative body, a censorship board, the police department or a court of law, decides that the public should not have access to some of the data on any given topic because the communication of such data will prove injurious in some manner, to that extent the public's ability to make an *informed judgment* on such topic is crippled by a distortion of the data before it." [Emphasis added.]

M.B. Nimmer, *Freedom of Speech: A Treatise on the First Amendment*, §1.02[A]pp. 1-7 Matthew Bender (1984).

Finally, the State has a constitutional duty to refrain from the establishment of religion. The State, through its courts, is the ultimate repository of power. *Marbury v.*

Madison 5 U.S. (1 Cranch) 137 (1803). The California Supreme Court has long held that religions

> "are [not necessarily] specially privileged groups, free of regulations that others must observe. If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. With that power so easily diminished there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty."

Gospel Army v. Los Angeles 27 Cal.2d 232, 163 P.2d 704, 712 (1945). This Court has recognized a related concept in affirming that the "absolute protection afforded belief by the First Amendment suggests that a court should be cautious in expanding the scope of that protection since to do so might leave government powerless to vindicate compelling state interests." *McDaniel v. Paty, supra,* 435 U.S. at 627.

Were the Unification Church allowed to lie to people so that it could brainwash them without their knowledge or consent, the decision to religiously affiliate would be withdrawn from the citizen and placed into the hands of the Unification Church. Such would be allowing religion to go too far. It would sanction the intrusion by religion into the citizen's equal and coextensive right to make voluntary decisions whether he wanted to religiously affiliate or not, and specifically, whether he wanted to affiliate with the Unification Church. The decision of the California Supreme Court is consistent with this principle and should be upheld.

Brainwashing is a word which describes a process utilized by the Unification Church to fraudulently coerce

and alter the course of peoples' lives. Rather than, as petitioners suggest, a "euphemism" for speech, brainwashing is a powerful tool used to alter the psyche and actions of the victim for petitioner's power and gain.

Thus, the State has multiple compelling interests which justify the imposition of a restriction upon the Unification Church's practices of deception and coercive persuasion. The decision to convert belongs neither to the Church nor to the State. It *belongs to the individual citizen*. Thus, a requirement that Churches forego deceptive and coercive recruiting means merely that Churches not use such methods to obtain membership. It does not mean that the State decides what is good practice and bad practice in the realm of religion. It simply means that the Church will respect the citizen's constitutional right to freely exercise constitutional, including religious, choices, including the choice to affiliate with religion at all.

Such brainwashing techniques being used in a religious environment, or under the guise of religion, must be examined.

There is no less restrictive alternative available than to allow a private cause of action sounding in tort. To criminalize brainwashing, allow involuntary deprogramming of individuals or require proselytizers to obtain informed consent prior to attempting to obtain a conversion are all more restrictive than allowing "passive liability for fraud." App. 27a. Thus, "it appears that to allow injured parties to bring private actions for fraud is the least restrictive means available for advancing the state's interest in protecting individuals and families from the harmful effects of recruitment." App. 27a-28a.

3. "The free exercise clause protects religious beliefs absolutely. (*Cantwell v. Connecticut, supra*, 310 U.S. at pp. 303-304.) While a court may inquire into the sincerity of a person's religious beliefs, it may not judge the truth or falsity of those beliefs. (*United States v. Ballard*, (1944) 322 U.S. 78, 86-88.) . . . However, while religious belief is absolutely protected, religiously motivated conduct is not. (*Sherbert v. Verner* 374 U.S. 398, 402-403.)" App. 18a-19a. As it was not necessary to determine the truth or validity of communism in order to ascertain whether a prisoner of war had been brainwashed, likewise it is not necessary to determine the truth or validity of the Unification Church ideology in order to ascertain whether Molko's affiliation was obtained by deceptive recruiting practices, including an unsuspecting exposure to coercive persuasion. Thus, an inquiry can be made into the conduct of the Church's alleged use of deception and coercion without testing the validity of the ideology thereby delivered.

The trial court and court of appeal improperly and heavily relied upon *Katz v. Superior Court* 73 Cal.App.3d 952 (1977) for the proposition that "it would be impossible to consider Molko's . . . theory 'without questioning the authenticity and force of the Unification Church's religious teachings and permitting as jury to do likewise, which is constitutionally forbidden." App. 22a. Although *Katz* "involved allegations of brainwashing against the Unification Church . . . [it did not involve] former Church members but parents of current Church members." App. 22a. The parents wanted to be appointed conservators of their children for the purpose of accomplishing their

involuntary deprogramming so as to terminate their association with the Church. After the trial court granted the conservatorship orders in favor of the parents, the court of appeal reversed. It held that the "processes of the state could not 'be used to deprive the believer of his freedom of action and to subject him to involuntary treatment' (73 Cal.App.3d at pp. 988-989.) The court declared the conservatorship orders violated the Church members' free exercise rights because the orders were based on a judgment regarding the truth or falsity of their beliefs. (*Id.* at p. 987.)" App. 23a. However, the reasoning of *Katz* is not properly applicable to Molko's circumstances. In this regard, California Supreme Court stated:

> "The conservatorship orders, if allowed to stand, would have directly and severely burdened the Church members' absolute right to believe in the teachings of the Unification Church. Not only would the orders have allowed the parents to remove their adult children from the religious community they claimed to desire; the orders would have further allowed the parents to subject those individuals, against their will, to a program specifically intended to eradicate their current religious beliefs. . . . [¶] In sharp contrast, liability for fraud in the case at bar would burden no one's right to believe and no one's right to remain part of his religious community, nor would it subject anyone to involuntary deprogramming: the plaintiffs here are former Church members themselves. It might, of course, somewhat burden the Church's efforts to recruit new members by deceptive means. [¶] The *Katz* court also faced a legal question markedly different from that now posed: it considered whether a court could determine if an asserted religious conversion 'was induced by faith or by coercive persuasion.' (*Katz v. Superior Court, supra,* 73 Cal.App.3d at p. 987.) In other words, the *Katz* court had to decide whether a court could 'question the

> validity' of a person's stated faith because someone *else* claimed the person was brainwashed. [¶] Again in contrast, the legal question here does *not* require a court to determine whether anyone's faith, current *or* past, is or was real. As stated above, Molko . . . [does] not question the Church's beliefs. Neither [does he] challenge the 'validity' of [his] former faith; [he states] quite plainly that [his] erstwhile beliefs in the Unification Church were sincere. The legal question is simply whether a religious organization can be held liable on a traditional cause of action in fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion. [¶] The Court of Appeal held that although *Katz* was different in certain ways, its analysis compelled the conclusion that to consider plaintiffs' fraud claims would require 'questioning the authenticity and force' of the Church's teachings. We disagree. The challenge here, as we have stated, is not to the Church's teachings or to the validity of a religious conversion. The challenge is to the Church's practice of misrepresenting or concealing its identity in order to bring unsuspecting outsiders into its highly structured environment. That practice is not itself belief – it is conduct 'subject to regulation for the protection of society.' (*Cantwell v. Connecticut, supra,* 310 U.S. at p. 304.)" App. 23a-24a.

Based on the foregoing reasoning, it is clear that the decision of the California Supreme Court is consistent with the long line of cases decided by this Court which stand for the proposition that under certain circumstances, such as those here, the State may impose restrictions upon what is claimed to be the practice of religion. The employment of deceit to cause the implementation of coercive persuasion is simply not the type of conduct that the Free Exercise Clause was designed to protect. The

First Amendment protects freedom. It does not license deceit and coercion.

4. Since the course of conduct employed by the Unification Church in fraudulently inducing Molko to unknowingly submit to brainwashing can be a basis for the imposition of tort liability, *a fortiori,* so can causes of action based upon the intentional infliction of emotional distress and restitution.

There is a clear question of fact whether it is outrageous conduct for the Unification Church to have allegedly lied to Molko to gain his trust in order to make him vulnerable to the imposition of Communist Chinese brainwashing techniques. Thus, it is a question for the determination of a jury.

Likewise, there is a question of fact whether such a course of deceptive and coercive conduct also constituted undue influence such that the Unification Church should return the money it allegedly improperly obtained from Molko.

The conduct of the Unification Church as discussed herein provides the basis for three causes of action, each one of which should be determined by a jury.

5. The prohibition of deception as a means of inducing unknowing submission to coercive persuasion is not a rule that will stifle the practice of religion by the Unification Church or by other religions, whether they be newer or older. It is conduct that is clearly identifiable such that, provided that it is not employed, will not threaten "the day-to-day activities of virtually all religions." Pet. 23.

Coercion has been chronicled as including: "trickery; isolation from friends, family, transportation or other sources of food, clothing, shelter, clothing or jobs . . . disorienting the victims by placing them in an unfamiliar environment, barraging them with orders, . . . controlling every detail of their lives; and weakening the victims . . . by lack of food, sleep, or proper medical care. [Citations.] One presumes these methods of coercion would not reappear with such depressing regularity if they were ineffective. [Footnote omitted.]" *United States v. Kozminski* 487 U.S. ___, 101 L.Ed.2d 788, 814, 108 S.Ct. ___ (1988) (J. Brennan, concurring.)

What is most salutary with respect to the decision of the California Supreme Court is that "[a]t most, it potentially closes one questionable avenue for bringing new members into the Church." App. 25a. Churches are accorded extraordinary rights and privileges which are not given to their secular brethren. Churches should not be allowed to abuse the extraordinary rights and privileges accorded to them as a means of violating the First Amendment rights enjoyed by the secular citizenry. For a church to employ deceit in order to impose sectarianism through the implementation of Chinese Communist brainwashing techniques makes a mockery of the First Amendment.

There are clearly identifiable distinctions, factually and legally, between behavior which is legitimate and that which is abusive. These distinctions could be no more carefully applied to this case than has already been done by the California Supreme Court. Its decision must be upheld. To do otherwise would tragically condone

deception and coercion in the name of religion and would ironically endorse the subjugation of American citizens by the very same techniques which subjugated the nation of China to Communist ideology.

Accordingly, the Court should deny the petition because the issues of the case were fully and correctly considered in the California Supreme Court, which properly balanced the interest of the Church with the interest of the State in accordance with a long line of authority issuing from this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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